Supreme Court, U.S.
FILED
06-54 . JUL 10 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,

Petitioner,

v.

PRISCILLA CATES, individually and as guardian of the person of BOBBY RAY CATES, an incapacitated person,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BLAZENA PSURNY*
WESSON H. TRIBBLE
3050 Post Oak Boulevard
Suite 1350
Houston, TX 77056
(713) 622-0444

* *Counsel of Record* *Attorneys for Petitioner*

201989

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This diversity action involves a conflict of laws question as to whether The Hertz Corporation's ("Hertz" or "petitioner") liability for the negligence of its lessee, Matthew Creamer ("Creamer"), is governed by Texas or Florida law. The Fifth Circuit resolved the conflict of laws issue in favor of Florida law. The Fifth Circuit affirmed Priscilla Cates' ("Cates" or "respondent") judgment against Creamer, vacated the summary judgment for Hertz granted on grounds that Texas had the most significant relationship to the parties and occurrence, and remanded to the district court for determination of Hertz's liability under Florida law for the judgment entered against Creamer under Texas law.

The claim was brought by Priscilla Cates, a Texas resident, against Matthew Creamer and Lamae Creamer, Florida residents, and Hertz, a Delaware corporation with a principle place of business in New Jersey, in the United States District Court, for the Northern District of Texas, Wichita Falls Division. The claim arises out of an automobile accident that occurred in Texas. The injury and the conduct causing injury, including Cates' contributory negligence, occurred in Texas. Cates asserted the application of Florida law to determine Hertz's liability for Cates' judgment against Creamer notwithstanding that (a) Cates had no prior contact with Florida; (b) Cates brought the action in Texas forum; (c) the negligence issue and Cates' recovery of damages was governed by Texas law; and (d) Cates did not present a legal authority on the application of the doctrine of depecage to personal injury actions arising out of automobile accidents involving parties of multiple states. In holding that Florida law determines Hertz's liability for Cates' judgment against

Creamer, entered under Texas law, the Fifth Circuit's decision does not comport with the Full Faith and Credit Clause of the United States Constitution, and conflicts with the United States Supreme Court's decision in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) and *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). Additionally, the Fifth Circuit's analysis of the conflict of law principles directly conflicts with the Third Circuit.

Three questions are presented:

1. Does the Full Faith and Credit Clause require the forum state, Texas, to supplement its laws by Florida's judicial doctrine of dangerous instrumentality if to do so would contravene the policy of the law of Texas, when such policy is reflected in the statutes and decisions of its courts?

2. Were the contacts with the forum state, Texas, in light of *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), insignificant and attenuated, such that the application of Texas law was arbitrary or fundamentally unfair to require a reversal?

3. Was the application of Florida's dangerous instrumentality doctrine to afford redress for economic damages to the Texas plaintiff, when such damages are arising out of the defendant's inability to meet a judgment entered under Texas law, constitutionally permissible when Florida had only "minimal" interest in the adjudication of the vicarious liability issue?

LIST OF PARTIES

The parties below are listed in the caption. The original proceeding was brought against Lamae Creamer and Matthew Creamer as co-defendants. The claims against Lamae Creamer were dismissed with prejudice. Co-defendant Matthew Creamer is not a party to this action.

CORPORATE DISCLOSURE STATEMENT

The Hertz Corporation is a Delaware corporation with a principle place of business in New Jersey. From 1994 to 2005, Hertz was a wholly owned subsidiary of Ford Motor Company, a wholly owned subsidiary of Ford Holdings, Inc. On December 21, 2005, Hertz Global Holdings, Inc. acquired all of Hertz's common stock from Ford Holdings, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES vi

TABLE OF APPENDICES x

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF FACTS 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION ... 8

I. REVIEW IS NECESSARY TO CONFIRM THAT THE APPLICATION OF TEXAS' SUBSTANTIVE LAW IN THIS CASE WAS CONSTITUTIONALLY PERMISSIBLE ... 10

Contents

Page

A. The Texas Supreme Court Has Never Adopted Or Interpreted Restatement (Second) of Conflicts of Laws § 174. The Fifth Circuit Erroneously Applied § 174 In Its Choice-Of-Law Analysis. 10

B. The Fifth Circuit Erred in Not Including In Its Choice-Of-Law Analysis Texas Public Policy Reflected In The Texas Supreme Court's Decision Invalidating Vicarious Liability in Bailments 12

C. The Fifth Circuit Erred in Not Considering In Its Choice-Of-Law Analysis Texas Public Policy Underlying Its Proportional Responsibility Laws .. 14

D. The Fifth Circuit Erred in Not Classifying The Issues As Substantive Of Procedural For Conflict-of-Law Purposes 15

E. The Fifth Circuit Decision Creates A Conflict As To Whether The Application Of The Forum State's Substantive Law Can Be Invalidated When The Forum State's Contacts With The Litigation Is Not Transient In Nature 16

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) ..... ii, 9, 10

Baker v. General Motors Corp.,
522 U.S. 222 (1998) 9

Bartley v. Budget Rent-A-Car Corp.,
919 S.W.2d 747
(Tex. App. – Amarillo 1996, no writ) 7, 14

Bertrand v. Mutual Motor Co.,
38 S.W.2d 417
(Tex.Civ.App.— Eastland 1931, writ ref'd) ... 12, 13

Budget Rent-A-Car System, Inc. v. Chappell,
407 F.3d 166 (3d Cir. 2005) 16, 18

Cates ex rel. Cates v. Creamer,
No. CIV.A.7:00CV0121-R, 2001WL 1196058
(N.D. Tex. Aug. 7, 2001) 1

Cates v. Creamer,
No. 7:00-CV-121-R, 2001WL 1338396
(N.D. Tex. Oct. 17, 2001) 1

Cates v. Creamer,
431 F.3d 456 (5th Cir. 2005) 1

Cited Authorities

Page

Cox v. Thee Evergreen Church,
836 S.W.2d 167 (Tex. 1992) 13

Duncan v. Cessna Aircraft Co.,
665 S.W.2d 414 (Tex. 1984) 10, 11, 15

Franchise Tax Bd. of California v. Hyatt,
538 U.S. 488 (2003) 9

Garcia v. Plaza Oldsmobile Ltd.,
421 F.3d 216 (3d Cir. 2005) 16, 18

Gutierrez v. Collins,
583 S.W.2d 312 (Tex. 1979) 9, 10, 11

Henry Schein, Inc. v. Stromboe,
102 S.W.3d 675 (Tex. 2002) 11

In re Chanel Financial, Inc.,
102 B.R. 549 (Bkrtcy. N.D. Tex. 1988) 16

Lee v. Delta Air Lines, Inc.,
797 F. Supp. 1362 (N.D. Tex. 1992),
aff'd 32 F.3d 566 (5th Cir. 1994) 11

Morris v. LTV Corp.,
725 F.2d 1024 (5th Cir. 1984) 15, 16

Pacific Employers Ins. Co.
v. Industrial Accident Comm'n,
306 U.S. 493 (1939) 9

Cited Authorities

Page

Rollins Leasing Corp. v. Barkley,
531 S.W.2d 603 (Tex. 1976) 6, 11, 13

Schneider v. Esperanza Transmission Co.,
744 S.W. 2d 595 (Tex. 1987) 7

Southern Cotton Oil Co. v. Anderson,
86 So. 629 (Fla.1920) 6

Sun Oil Co. v. Wortman,
486 U.S. 717 (1988) ..... ii, 9

Susco Car Rental System v. Leonard,
112 So. 832 (Fla. 1959) 6

Constitutions and Statutes:

U.S. Const., Art. IV, § 1 (Full Faith & Credit Clause)
..... 2, 8

28 U.S.C. § 1254(1) 1

TEX. CIV. PRAC. & REM. CODE. ANN.
§§ 33.001, *et seq.* 14

Cited Authorities

Page

Restatement and Secondary Authorities:

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS
§ 6 (1971) ..... *passim*

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS
§ 145 (1971) ..... *passim*

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS
§ 174 (1971) ..... *passim*

Texas Rules of Form, School of
Law Publications, Inc. (2003) 13

John T. Montford & Will G. Barber,
1987 Texas Tort Reform,
25 HOUS. L. REV. 59, 80-101 (1988) 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed November 28, 2005 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Texas, Wichita Falls Division, Signed August 6, 2001 And Filed August 7, 2001 ..... 27a

Appendix C — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Texas, Wichita Falls Division, Dated And Filed October 17, 2001 .... 38a

Appendix D — Order Of The United States Court Of Appeals For The Fifth Circuit Denying The Petition For Rehearing And The Petition For Rehearing *En Banc* Dated And Filed April 11, 2006 ..... 41a

Appendix E — Statutory Provision Involved 43a

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Cates v. Creamer*, 431 F.3d 456 (5th Cir. 2005). The Fifth Circuit affirmed in part, vacated in part, and remanded the April 4, 2003 amended judgment of the United States District Court for the Northern District of Texas, Wichita Falls Division (not reported in F. Supp. 2d). The amended judgment incorporates the August 7, 2001 Court's Memorandum and Order published at *Cates ex rel. Cates v. Creamer*, 2001 WL 1196058 (not reported in F. Supp. 2d), and affirmed on October 17, 2001 in *Cates v. Creamer* published 2001 WL 1338396 (not reported in F. Supp. 2d). *See* Appendices A - D.

The Fifth Circuit's Opinion was rendered on November 28, 2005. The Petition for Panel Rehearing and the Petition for Rehearing *En Banc* were denied on April 11, 2006. *See* Appendix D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Constitution of the United States, Article IV, Section 1:

Full Faith and Credit Clause.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Restatement (Second) of Conflict of Laws, Section 6 (1971):

Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws, Section 145 (1971):

The General Principle.

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws, Section 174 (1971):

Vicarious Liability.

The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person.

The relevant comments to provisions of Restatement (Second) of Conflict of Laws § 174 are set out in Appendix E.

STATEMENT OF FACTS

On June 29, 1998, Florida residents Lamae Creamer and Matthew Creamer rented a van from Hertz in Florida to drive to Texas for a family reunion. The Hertz agent verified that Lamae Creamer had a valid Florida driver's license. Matthew Creamer also had a valid Florida driver's license. Ms. Creamer signed a rental agreement that created a bailment. The agreement did not contain a choice-of-law provision.

The Creamers began driving at around noon on June 29. Creamer drove the first eight hours of the trip, at which time Ms. Creamer began to drive. She drove through the night into Texas while Creamer slept in the van. When he woke up, he saw that the van was parked on the side of the road and Ms. Creamer was asleep. He moved to the driver's seat and resumed driving. He went momentarily to sleep while driving and hit Bobby Cates' car, which was parked or stalled on the road. Cates was apparently standing in front of the opened front passenger door and sustained severe injuries in the collision. Cates was intoxicated and his driver's license had been suspended due to a DWI. As a result of the injuries, Cates is incapacitated and resides at a long-term care facility.

Matthew and Lamae Creamer are Florida residents. Cates is a Texas resident. Hertz is a Delaware corporation with its principal place of business in New Jersey, with authority to conduct business in Texas.

STATEMENT OF THE CASE

This diversity action involves a conflict of laws question as to whether Texas or Florida's law determines Hertz's liability for negligence of its lessee, Matthew Creamer. Florida applies strict vicarious liability to automobile owners by its judicially created doctrine of dangerous instrumentality.[1] The Texas Supreme Court rejected vicarious liability in bailments.[2] Respondent Cates asserts that under the Texas' choice-of-law rules the court must focus the analysis on the *particular issue* in dispute rather than on the case as a whole. The disputed issue here is whether Hertz is liable for Cates' judgment against Creamer entered under Texas law. Cates asserts that Florida has the "most significant relationship" to the *particular issue* of Hertz's vicarious liability for Creamer's negligence.

Cates filed her Complaint against the Creamers and Hertz in the Northern District of Texas, Wichita Falls Division on June 29, 2000. Cates asserted claims against Matthew Creamer and Lamae Creamer for negligence, predicated on Texas law, and against Hertz under Florida's dangerous

---

1. *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 631-34 (Fla. 1920). Under this doctrine, an owner/lessor of a vehicle is vicariously liable for damages caused by the negligent operation of the vehicle by the person to whom it has been entrusted. *Susco Car Rental System v. Leonard*, 112 So. 832, 835 (Fla. 1959).

2. *Rollins Leasing Corp. v. Barkley*, 531 S.W.2d 603 (Tex. 1976).

instrumentality doctrine or, alternatively, under Texas' negligent entrustment laws.[3]

Hertz moved for summary judgment on the basis that Texas had "the most significant relationship" to the parties and occurrence, and Florida had no policy interest in determination of the issues. On August 7, 2001, the district court granted summary judgment in favor of Hertz on the issue of negligent entrustment and dismissed Cates' claims against Hertz.

Cates' action against the Creamers proceeded to trial on July 9, 2002. Hertz did not participate at trial. The jury found the Creamers not negligent. On November 8, 2002, the District Court signed an order granting a new trial.

Cates' action against the Creamers proceeded to a second trial, again without Hertz, on February 3, 2003. Cates' negligence was submitted to the jury under the Texas comparative negligence statute. The second jury found Creamer seventy percent negligent and Cates thirty percent negligent. The jury assessed actual damages of $3,080,000. An amended judgment was signed on April 4, 2003, awarding Cates $2,156,000 in actual damages from Creamer plus

---

3. The elements constituting negligent entrustment are: "(1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, (4) that the driver was negligent on the occasion in question and (5) that the driver's negligence proximately caused the accident." *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1988). Proof of a valid driver's license is *prima facie* evidence of a driver's competency. *Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747, 752 (Tex. App. – Amarillo 1996, no writ).

prejudgment interest of $851,782.47. All claims against Lamae Creamer were dismissed with prejudice. The Amended Judgment also dismissed all claims against Hertz in accordance with the District Court's Memorandum Opinion and Order previously entered on August 7, 2001.

Cates filed her Notice of Appeal on April 18, 2003. The Fifth Circuit's decision was entered on November 28, 2005. Petitioner timely filed its Petition for Rehearing Before Panel on December 12, 2005. On December 12, 2005, petitioner and cross-appellant filed their Appellee's and Cross-Appellant's Joint Motion For Leave to File Out Of Time Petition for Rehearing *En Banc* (the "Motion"). The Fifth Circuit granted the Motion on February 2, 2006. Petitioner timely filed its Petition for Rehearing *En Banc* on February 2, 2006. On April 11, 2006, the Fifth Circuit denied the Petition for Rehearing Before Panel and the Petition for Rehearing *En Banc*.

REASONS FOR GRANTING THE PETITION

Whether the strict vicarious liability of automobile owners created by Florida's doctrine of dangerous instrumentality is contrary to Texas public policy, when such policy is reflected in the statutes and decisions of its courts, and whether the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, requires Texas to give full faith and credit to the dangerous instrumentality doctrine of Florida to replace its doctrine of negligent entrustment, are important questions which require resolution, and on which this Court's review is warranted.

This Court has previously ruled that the full faith and credit obligation "is exacting" with respect to a final

judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, *Baker v. General Motors Corp.*, 522 U.S. 222, 223 (1998), but is less demanding with respect to choice of laws. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003). The Clause does not compel a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate. *Id.* at 489; citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501(1939). In *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), this Court held that for a State's substantive law to be selected in a constitutionally permissible manner, the State must have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313.

The Fifth Circuit erred in not considering in its conflict-of-laws analysis the constitutional limitations set forth in § 6 of the Restatement (Second) of Conflict of Laws and adopted by the Supreme Court of Texas in *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979), for tort choice of law issues. The Fifth Circuit concluded that the interest analysis of § 6, which implicates the constitutional inquiry, provided "little impact" on its decision.[4]

The Fifth Circuit erred in not analyzing the basic policies underlying Texas' proportional liability laws.[5] The Fifth Circuit recognized that Florida's interest in having its law

---

4. Opinion, p. 18a.

5. Opinion, p. 18a, Fn. 8.

applied to the vicarious liability issue was only "minimal,"[6] but it failed to state a public policy or constitutional grounds for invalidating a Texas U.S. District Court's decision to apply Texas law to a case over which it had proper jurisdiction.

In consequence, the Fifth Circuit's decision does not comport with the constitutional choice-of-law test enunciated by this Court in the holding in *Hague*, and this Court's review is warranted.

I. REVIEW IS NECESSARY TO CONFIRM THAT THE APPLICATION OF TEXAS' SUBSTANTIVE LAW IN THIS CASE WAS CONSTITUTIONALLY PERMISSIBLE

A. The Texas Supreme Court Has Never Adopted Or Interpreted Restatement (Second) of Conflicts of Laws § 174. The Fifth Circuit Erroneously Applied § 174 In Its Choice-Of-Law Analysis.

Texas has adopted the "most significant relationship" test for tort choice-of-law issues in *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). The Court in *Gutierrez* specifically adopted §§ 6 and 145 of the Restatement (Second) of Conflicts for "all conflicts cases sounding in tort."[7] *Id.* at 318. In *Duncan v. Cessna Aircraft Co.*, the Court reiterated that it adopted the "most significant relationship

---

6. Opinion, p. 18a.

7. The Court explained that "this methodology offers a rational yet flexible approach to conflicts problems," . . . "offers the courts some guidelines without being too vague or too restrictive, . . . and "includes 'most of the substance' of all the modern theories." *Id.*

test set forth in §§ 6 and 145 of the Restatements (Second) of Conflict of Laws." 665 S.W.2d 414, 421 (Tex. 1984). In *Henry Schein, Inc. v. Stromboe*, the Texas Supreme Court stated again that § 6 and § 145 apply in "all future tort cases" and indicated that the analysis under § 6 and § 145, in a tort case involving a Texas resident, is likely to result in the application of Texas law. 102 S.W.3d 675 (Tex. 2002).

Additionally, Texas courts of appeal have noted that the "most significant relationship" test that Texas follows is "embodied" or "enunciated" in §§ 6 and 145 of the Restatement (Second) of Conflicts. As well, Texas district courts have noted that the Texas Supreme Court has not adopted all sections of the Restatements for all choice-of-law issues. *See Lee v. Delta Air Lines, Inc.*, 797 F. Supp. 1362, 1367 (N.D. Tex. 1992), *aff'd*, 32 F.3d 566 (5th Cir. 1994).[8]

Further, the Texas Supreme Court rejected vicarious liability in bailments in *Rollins Leasing Corp. v. Barkley*, 531 S.W.2d 603, 605 (Tex. 1976). In consequence, the Texas courts have never adopted or interpreted § 174 for use in choice of law decisions. Section 174 directly addresses vicarious liability and instructs that "[t]he law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person." Restatement (Second) of Conflicts of Laws § 174.

---

8. The Court in *Lee* stated that '[t]he most significant relationship methodology was adopted by the Texas Supreme Court for tort choice-of-law issues in *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979), and for all other choice-of-law issues, *with limited exceptions*, in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)." [emphasis added]

Section 145 instructs that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) of Conflicts of Laws § 145.

The Fifth Circuit erroneously rests its choice-of-law analysis and decision on the comments contained in § 174, and fails to include the principles stated in § 6, which implicate the constitutional limitations. (*See* Appendix E.)

B. The Fifth Circuit Erred in Not Including In Its Choice-Of-Law Analysis Texas Public Policy Reflected In The Texas Supreme Court's Decision Invalidating Vicarious Liability in Bailments

The Fifth Circuit erred in not examining the public policy behind the vicarious liability laws of each state, Texas and Florida, reflected in the decisions of the states' courts. The Fifth Circuit recognized that Florida's dangerous instrumentality doctrine may not have an extraterritorial reach, stating that "no Florida precedent exist" to resolve the question "whether the Florida law of vicarious liability may be applied to benefit non-Florida residents in a situation such as the case at hand."[9]

Texas courts have repeatedly rejected vicarious liability in bailments if there is no agency or control relationship. In *Bertrand v. Mutual Motor Co.*, 38 S.W.2d 417, 418 (Tex. Civ. App.— Eastland 1931, writ ref'd), the Texas Supreme Court approved the rule that the bailor of an automobile,

---

9. Opinion, p. 18a.

who had no control over its operation by the bailee, was not liable to a third party for injuries arising from the bailee's negligence.[10]

In *Rollins*, the Texas Supreme Court, approving the rule in *Bertrand* and strongly criticizing the doctrine of "imputed contributory negligence," rejected vicarious liability in bailment relationships. 531 S.W.2d 605. In so doing, the Court stated: "This test recognizes that in the absence of some type of control relationship, there is no more reason in logic to automatically impute contributory negligence than there is to so impute primary negligence." *Id.*

In *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992), the Texas Supreme Court reiterated the holding in *Rollins*, stating: "When we decided *Rollins* in 1975, we were the last jurisdiction to abandon the outdated bailment/agency analogy and with it went the doctrine of imputed contributory negligence between a bailor and a bailee." *Id.* at 177.

The Fifth Circuit's error in not conducting the analysis of Texas public policy, enunciated in the Texas Supreme Court's decisions, warrants this Court's review.

---

10. "Writ refused" [writ ref'd] indicates that the "judgement of the court of civil appeals is correct. Such cases have equal precedential value with the Texas Supreme Court's own opinions." Texas Rules of Form, School of Law Publications, Inc., Austin, 2003.

C. The Fifth Circuit Erred in Not Considering In Its Choice-Of-Law Analysis Texas Public Policy Underlying Its Proportional Responsibility Laws

Respondent's judgment against Creamer, for which she seeks to hold Petitioner liable, was rendered under Texas' proportional responsibility laws.[11] The legislative history of the Texas Tort Reform, and the public policy underlying the enactment, is reflected in *Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747, 754 (Tex. App.– Amarillo 1996, no writ), a case factually identical to the case at bar, on which Petitioner relied for its analysis and reasoning.

The Court in *Bartley*, quoting Montford & Barber in *1987 Texas Tort Reform*, stated the public policy underlying the proportional responsibility as follows:

> The major purposes of the legislation were to make the Texas civil justice system fairer, more predictable by favorably affecting the affordability and availability of liability insurance, and thus, by making the system fairer and more predictable, to promote economic development and growth in Texas.

Id. at 756; Montford & Barber, *supra*, at 69-70.

The Fifth Circuit found *Bartley* unhelpful to its analysis because it did not address § 174.[12] Texas courts have not adopted or interpreted § 174. Because the Fifth Circuit did not include *Bartley* in its choice-of-law analysis, the Fifth

---

11. Tex. Civ. Prac. & Rem. Code. Ann. §§ 33.001, *et seq.*

12. Opinion, p. 18a, Fn. 8.

Circuit concluded, erroneously, that Texas had only a "minimal interest" in having its laws apply to the vicarious liability issue and invalidated the Texas U.S. District Court's application of Texas law to the controversy before the court.

D. The Fifth Circuit Erred in Not Classifying The Issues As Substantive Or Procedural For Conflict of Law Purposes

The general conflict-of-laws rule in Texas is that "questions of substantive law are controlled by the laws of the state where the cause of action arose, but . . . matters of remedy and of procedure are governed by the laws of the state where the action is sought to be maintained." *Morris v. LTV Corp.*, 725 F.2d 1024 (5th Cir. 1984). Since the Fifth Circuit statement in *Morris*, the Texas Supreme Court abandoned the *lex loci* rules for substantive issues in favor of the Restatement (Second) of Conflict of Laws' most significant relationship approach. *Duncan*, 665 S.W.2d at 421. The Texas choice of law rule for substantive issues now provides:

> [I]n all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue.

Duncan, 665 S.W.2d at 421.

Since the decision in *Duncan*, the Texas courts have neither overruled nor questioned the vitality of *Morris* for the proposition that matters of remedy are governed by the laws of the state where the action is sought to be maintained,

and continue to follow the Fifth Circuit's analysis in *Morris. In re Chanel Financial, Inc.*, 102 B.R. 549, 550 (Bkrtcy. N.D. Tex. 1988). Federal courts in Texas must follow the Texas conflict rule even though applying the rule would bar the plaintiff's recovery. *Morris*, 725 F.2d at 1027.

The critical question before the Fifth Circuit was whether vicarious liability is substantive or remedial for conflict-of-law purposes. Petitioner asserted below that vicarious liability is remedial, and relied on *Morris* for its analysis. The Fifth Circuit has not conducted this analysis.

E. The Fifth Circuit Decision Creates A Conflict As To Whether The Application Of The Forum State's Substantive Law Can Be Invalidated When The Forum State's Contacts With The Litigation Is Not Transient In Nature

The Fifth Circuit's holding that Florida law governs Hertz's vicarious liability for the respondent's judgment against Creamer, based on the Court's determination that "the most relevant relationship [of the parties] is that which arises from the lease of the automobile,"[13] cannot be reconciled with the Third Circuit's holding in *Budget Rent-A-Car System, Inc. v. Chappell*, 407 F.3d 166 (3d Cir. 2005) and in *Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216 (3d Cir. 2005).

In *Budget*, the Third Circuit considered a choice of law question on facts similar to this case. The automobile rental company, as an owner of the automobile, brought a diversity action against the renter and passenger seeking a declaratory judgment as to which state's substantive law (New York's,

13. Opinion, p. 16a.

Michigan's or Pennsylvania's) governed its vicarious liability to the renter's passenger. The passenger brought vicarious liability and negligent entrustment counterclaims against the company and a cross-claim against the renter. The injured passenger was a New York resident and the renter was a Michigan resident who had rented the car in Michigan (and previously driven to New York). The accident occurred, and the lawsuit was brought, in Pennsylvania. The district court applied Pennsylvania law.

The Third Circuit conducted a thorough analysis of public policies of each state, and the relative interests of those states in the determination of the controversy. New York had an unlimited vicarious liability statute whereas Pennsylvania followed the common-law rule that, absent an agency relationship, an automobile owner was not liable for the negligence of its driver. *Id.* at 172. The Third Circuit determined that the New York legislature, in enacting § 388(1) of New York's Vehicle and Traffic Laws, "intended that the insured party be afforded a financially responsible insured person against whom to recover for injures." *Id.* at 170. Additionally, New York's Courts of Appeal construed § 388(1) as having extraterritorial application. The Third Circuit found that the interest of New York, the injured passenger's domicile, in having its statute applied was "clear, direct, and compelling." The Third Circuit reversed the district court's application of its own law on the basis that Pennsylvania had only a transient interest to the parties, and had no interest in securing a recovery for the injured counter-plaintiff and no interest in limiting Budget's liability. The Third Circuit determined that the interest of Michigan, the place of the rental agreement, in having its statute applied was "uncertain and tenuous at best." *Id.*

The Fifth Circuit's determination that Florida, the place of the rental agreement in this case, had a paramount interest in having its dangerous instrumentality doctrine applied to the vicarious liability issue creates a conflict with the Third Circuit's decision.

In *Garcia*, the Third Circuit, with the participation of then-Judge Alito, considered again a conflict-of-law issue whether Pennsylvania common law or New York's statutory law governed Plaza's liability. A Pennsylvania driver, Garcia, who was injured in a motor vehicle accident in Pennsylvania, brought a diversity action against the New York driver and Plaza Oldsmobile, a New York corporation with a principal place of business in that state. Garcia asserted that New York statutory law applied, whereas Plaza asserted that Pennsylvania law applied. The district court applied New York law. *Id.* at 219.

As in the decision in *Budget*, the Third Circuit conducted an "interest analysis" of the policies of all interested states and then - based on the results of that analysis - determined whether the case involved a true of false conflict or whether it was an "unprovided for" case. *Id.* at 220. The Third Circuit determined that Pennsylvania had an interest in providing for the plaintiff's recovery, and that New York's vicarious liability law was not so offensive to the policy of Pennsylvania as to prevent the application of New York law. Accordingly, the Third Circuit upheld the district court's decision.

The Fifth Circuit erred in not conducting this "interest analysis" of the policies underlying Texas law, and in not taking into account the respondent's domicile, place of injury, and place of conduct causing injury, as well as the contractual nature of the rental agreement. Review is necessary so that this Court may remedy the Fifth Circuit's error and bring a certainty to the proper reach of Florida's dangerous instrumentality doctrine.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

BLAZENA PSURNY*
WESSON H. TRIBBLE
3050 Post Oak Boulevard
Suite 1350
Houston, TX 77056
(713) 622-0444

* *Counsel of Record*

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 28, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-10404

PRISCILLA S. CATES, Individually and as Guardian of the Person and Estate of Bobby Ray Cates, an Incapacitated Person,

Plaintiff-Appellant-Cross-Appellee,

versus

MATTHEW SCOTT CREAMER,

Defendant-Appellee-Cross-Appellant,

LAMAE CREAMER; HERTZ CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas, Wichita Falls
USDC No. 7:00-CV-121

Before JOLLY, JONES and DEMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The lease for the Hertz rental car was executed in Florida. The wreck and Bobby Cates's injuries occurred in Texas.

Appendix A

The defendant driver, Matthew Scott Creamer, momentarily went to sleep while driving. Mr. Cates's car had stalled on the side of the highway when Creamer hit it, severely injuring Bobby Cates. The first jury found no negligence and returned its verdict for the defendant, Creamer. The district court granted a new trial. The second jury found Creamer 70% at fault for the accident and awarded damages to the plaintiff. The court, however, applied Texas law and exonerated Hertz from liability. Cates hopes to collect the award from Hertz based on the Florida law relating to vicarious liability. Creamer hopes to reinstate the first jury's verdict, which means we have to decide whether Creamer's falling asleep at the wheel was fault-free. If we uphold the grant of a new trial and the verdict of the second jury, then we must decide whether Texas or Florida law applies to determine Hertz's vicarious liability. If Texas law applies, Hertz prevails in this appeal. If Florida law applies, Cates prevails.

Ultimately, we uphold the district court's grant of a new trial to Cates and, consequently, the verdict of the second trial. We further hold that Florida law applies to the vicarious liability issue and remand the case to the district court for further proceedings applying Florida law.

I

A

On June 29, 1998, Florida residents Matthew and Lamae Creamer rented a mini-van from Hertz Corporation ("Hertz")

in Florida.[1] They planned to travel from Panama City, Florida to Spearman, Texas for a family reunion. They apparently told the Hertz agent that they planned to make the 24-hour trip without stopping for the night by alternating drivers. The Creamers signed a rental agreement that stated: "This agreement is solely for the purpose of creating a bailment that allows You to use the car as permitted by this agreement." Under the agreement, the Creamers could drive the minivan anywhere in the United States and Canada, but they were obligated to return it to Florida. The agreement referenced Florida's financial responsibility and "no fault" personal injury laws but did not contain a choice-of-laws provision.

The Creamers began driving at around noon on June 29. Matthew Creamer ("Creamer") drove approximately eight hours from Panama City to New Orleans, Louisiana, at which time Mrs. Creamer began to drive. She drove through the night into Texas while Creamer slept in the car. He awoke near daybreak to discover that the car was pulled over to the side of the road and that Mrs. Creamer was asleep. He then resumed driving and set the cruise control to 70 miles per hour, the highway's speed limit. Creamer fell asleep at the wheel and awoke as he hit Bobby Ray Cates's ("Mr. Cates") parked car. Tragically, Mr. Cates was standing in front of the front passenger door and the impact of the collision projected him several feet into the roadway.

---

1. Hertz is incorporated in Delaware and its principal place of business is New Jersey.

As a result of the severe head injuries he sustained, Mr. Cates is unable to work and is almost completely incapacitated. Mr. Cates's medical expenses exceed $200,000. He resides at a long-term care facility. Priscilla Cates ("Cates") is his legal guardian.

B

Cates filed a diversity suit in the Northern District of Texas against Creamer for negligent operation of a motor vehicle under Texas law, seeking compensation for medical expenses and lost wages. She also sued Hertz under Florida's "dangerous instrumentality doctrine," which imposes vicarious liability on the owner/lessor of a vehicle who entrusts it to a lessee who operates it negligently, causing damages. Hertz moved for summary judgment, contending that Texas law, not Florida law, controls the vicarious liability issue. Texas does not recognize the dangerous instrumentality doctrine; instead, it has adopted the doctrine of negligent entrustment, which provides that for Cates to make Hertz vicariously liable she must show: "(1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, (4) that the driver was negligent on the occasion in question and (5) that the driver's negligence proximately caused the accident." *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex.1987). The district court granted Hertz's motion and dismissed Cates's suit against Hertz after finding that Cates could not make a *prima facie* case of negligent entrustment against Hertz under Texas law. It subsequently denied Cates's motion to reconsider its summary judgment order.

Appendix A

The first trial, with Creamer as the sole defendant, began on July 9, 2002. Creamer denied that he was liable and argued that Cates was contributorily negligent. The jury returned a verdict in which it found that Creamer was not negligent. The district court, however, granted Cates's motion for new trial. The second jury returned a verdict in favor of Cates, finding that Creamer was 70% negligent and Mr. Cates was 30% negligent. The jury assessed actual damages of $3,080,000.00. The district court entered judgment of $2,156,000 plus prejudgment interest of $851,782.47.

This appeal and cross appeal present two issues. First, Cates appeals the summary judgment dismissing Hertz, contending that Florida law, not Texas law, controls the issue of vicarious liability. Creamer cross-appeals the grant of Cates's motion for new trial. He urges that the district court abused its discretion in granting the motion for new trial because the first verdict was not against the great weight of the evidence. Creamer requests that we reinstate the first verdict. We will address this issue first.

II

We review a district court's grant of a motion for new trial for abuse of discretion. *Gov't Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995). Where a motion for a new trial is granted, we scrutinize that decision more closely. *Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989) (noting that when a motion for new trial is granted "the broad discretion allowed to the trial court is tempered by the deference due to a jury[ ]"). We review a grant of summary judgment *de novo*,

applying the same standard as the district court. *U.E. Texas One-Barrington, Ltd. v. Gen. Star Indem. Co.*, 332 F.3d 274, 276 (5th Cir. 2003). Finally, we review a district court's conflict of laws determination *de novo*. *Spence v. Glock*, 227 F.3d 308, 311 (5th Cir. 2000).

III

A

A district court can grant a motion for new trial if the first trial was unfair or if the jury verdict was against the great weight of the evidence. *Monsanto*, 868 F.2d at 789. Several factors guide us in the review of a district court's order granting a new trial: We consider the simplicity of the issues, "pernicious occurrences" at trial, and the extent to which the evidence is in dispute. *Id.* (quoting *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985)). If we determine that one or more of the above factors supports the district judge, we generally affirm the grant of a new trial. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 931 (5th Cir. 1982). However, even if we find that all three of these factors weigh against the grant of a new trial, we may still apply an overriding consideration and affirm the district court's order of a new trial by determining "independently[ ] that the jury verdict was against the great weight of the evidence." *Id.*

We will assume that each of the three factors tilts against the grant of a new trial here. The question thus becomes whether the fourth consideration, standing alone, supports

the grant of a new trial. *See Shows*, 671 F.2d at 931. We have frequently affirmed district court grants of motions for new trials on evidentiary grounds alone. *See, e.g., Shows*; *United States v. Horton*, 622 F.2d 144 (5th Cir. 1980); *Bazile v. Bisso Marine Co., Inc.*, 606 F.2d 101 (5th Cir. 1979); *Massey v. Gulf Oil Corp.*, 508 F.2d 92 (5th Cir. 1975); *Weyerhaeuser v. Bucon Construction Co.*, 430 F.2d 420 (5th Cir. 1970).

Creamer argues that he presented sufficient evidence for the jury to find in his favor. He maintains that falling asleep at the wheel creates only a rebuttable inference of negligence. Creamer further argues that he successfully rebutted that inference by submitting evidence that Mr. Cates was drunk at the time of the accident, that Mr. Cates did not turn on his hazard lights after pulling over, that Mr. Cates's car may not have been entirely off the road,[2] that Creamer had no reason to anticipate that he would fall asleep at the wheel because he was well-rested when he began driving that morning, and that Creamer had nodded off only momentarily.

Cates counters that Creamer did not present any evidence that justified or excused his falling asleep at the wheel and thus did not rebut the inference of negligence. She further argues that any evidence tending to show Mr. Cates's negligence goes only to comparative negligence and does not relieve Creamer of responsibility. She also contends that Creamer's contention that Mr. Cates's car was in the roadway

---

2. Creamer argues that the jury could have concluded that Cates's car was in the road from Creamer's testimony that his car had just hit the roadway's rumble strips when he collided with Cates's parked car.

is meritless because it is controverted by the police officer's report, which found that Mr. Cates's car was legally parked on the shoulder. Finally, Cates argues that the danger of a crash is foreseeable when the driver falls asleep while traveling 70 miles per hour. These facts, Cates argues, foreclose any doubt as to the foreseeability of the accident.

B

We agree with Cates that the district court did not abuse its discretion in concluding that the first jury verdict was against the great weight of the evidence. This conclusion is clearly supportable when evaluated under Texas law. Texas case law acknowledges that "[i]t is hardly possible to yield to sleep without having premonitory symptoms of its approach [.]" *McMillian v. Sims*, 112 S.W.2d 793, 797 (Tex.Civ.App.1937, writ dism. agr.). When a driver ignores these warnings and falls asleep while driving, as Creamer concedes, an inference of negligence arises. *Id.* (citing *Potz v. Williams*, 113 Conn. 278, 155 A. 211, 212 (Conn. 1931)). Creamer cannot point to any evidence that he did not experience these premonitory symptoms of sleep. Creamer's evidence that he was well-rested before driving shows only that he exercised due care before he became sleepy; it shows neither that he had no warning signs of sleepiness nor that he was excused or justified in ignoring such signs. Moreover, the evidence relating to Cates's fault does not go to exonerate Creamer—it goes to establish comparative fault for the injury. Because we find that Creamer did not rebut the inference of negligence arising from his nodding off at the wheel, we affirm the district court's holding that the first jury verdict—

relieving Creamer of all liability—was against the great weight of the evidence.

We now turn to consider whether the district court erred in applying Texas law instead of Florida law, which had the effect of relieving Hertz of all liability.[3]

IV

A

We review *de novo* a district court's choice of law determination. *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570, 576 (5th Cir. 1996).

Cates argues that the district court erred in its conflict of laws analysis, specifically, by failing to follow the narrow issue-by-issue approach set forth in the Second Restatement on Conflicts of Laws, which Texas has adopted. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984). She contends that the court should have focused on the facts and circumstances surrounding the issue of vicarious liability—not on the issue of general negligence. In support of her argument she cites § 174 of the Second Restatement on Conflict of Laws, which provides that

> [t]he local law of the state which has the most significant relationship to the occurrence and the parties with respect to the issue of vicarious

3. Cates does not challenge the district court's analysis of Texas's negligent entrustment law.

liability should be applied in determining whether one person is liable for the tort of another person.[4]

Hertz argues that § 174 should not be applied to this case because it contains a specifically relevant limitation: In determining which state's law should apply to an issue of vicarious liability, "the forum will be influenced by rules of vicarious liability prevailing in other states." Restatement (Second) Conflict of Laws § 174 cmt. b (1971). Hertz asserts that state laws have overwhelmingly rejected vicarious liability arising from the dangerous instrumentality doctrine. Thus, Hertz concludes, the prevailing view of the majority of the states should persuade the forum court not to apply vicarious liability under Florida law.

B

(1)

Hertz's argument that we should disregard the Florida rule on vicarious liability because only three states have adopted the dangerous instrumentality doctrine ignores the broader and more relevant consideration. Although § 174 requires us to "be influenced by the rules of vicarious liability prevailing in other states[,]" it also directs that "a relationship which forms the basis for the imposition of vicarious liability in a substantial number of states" will likely be adequate for

4. Further support for this proposition is found in the Restatement's statement that "[e]ach issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states." Restatement (Second) Conflict of Laws § 145 cmt. d (1971).

such an imposition, "even if it would not result in such liability under the forum's local law." Restatement (Second) Conflict of Laws § 174 cmt. b. The relevant inquiry, thus, is not how many states have adopted the precise rule that prevails in Florida, but how many states recognize vicarious liability in comparable relationships between bailor and bailee. We note that at least nineteen states, including the District of Columbia, arguably impose vicarious liability on automobile lessors in some circumstances, often under the principles of agency.[5] At least eight of those jurisdictions would likely impose vicarious liability on automobile lessors

---

5. *See* 59 Bus. Law. 1161; N.Y. Veh. & Traf. Law § 388 (McKinney 1996 & Supp.2004); *Shuck v. Means*, 302 Minn. 93, 226 N.W.2d 285, 287 (1975); Mich. Comp. Laws § 257.401; *Burton v. Gardner Motors, Inc.*, 117 Cal. App.3d 426, 429, 172 Cal. Rptr. 647, 649 (1981); Conn. Gen. Stat. § 14-154a (2003); *Enter. Leasing Co. S. Cent., Inc. v. Hughes*, 833 So.2d 832, 837-38 (Fla. Dist. Ct. App. 2002); Me. Rev. Stat. Ann. 29-A § 1652; RI Stat. § 31-34-4; *Curtis v. Cuff*, 537 A.2d 1072, 1074 (D.C. 1987); Iowa Code § 321.493; Del.Code Ann. tit. 21, § 6102(a) (1995); *Bell v. Reid*, 118 Ill. App. 3d 310, 73 Ill. Dec. 868, 454 N.E.2d 1117, 1119 (1983) (holding that the vehicle owner is liable for negligence of the driver unless the owner can rebut the presumption of agency); *Williams v. Wheeler*, 252 Md. 75, 249 A.2d 104, 110-11 (1969) (holding that the owner of a vehicle who was not driving at the time of the accident cannot be held vicariously liable unless there was evidence of agency); Mass. Gen. Laws Ann. ch. 231 § 85A; *Harvey v. Craw*, 110 N.J.Super. 68, 264 A.2d 448, 451 (N.J. Super. Ct. App. Div. 1970), *cert. dismissed*, 56 N.J. 479, 267 A.2d 61 (1970) (noting that the owner/lessor may be held vicariously liable unless the presumption of agency is rebutted); Okla. Stat. Ann. tit. 47, § 8-102(c); Wis. Stat. Ann. §§ 344.51(2), 344.01(2)(d) (1999); *McGrew v. Stone*, 998 S.W.2d 5, 6 (Ky. 1999); Nev.Rev.Stat. § 482.305.

in the same manner that Florida does.[6] We think that this establishes an adequate basis for a Texas court to impose Florida's law of vicarious liability despite the fact that Texas itself does not recognize vicarious liability under these circumstances. Accordingly, we reject Hertz's argument that the imposition of vicarious liability on these facts is so aberrant that we should disregard a § 174 analysis.

(2)

Section 174 directs forum courts to apply "[t]he local law of the state which has the most significant relationship to the occurrence and the parties with respect to the issue of vicarious liability" in deciding "whether one person is liable for the tort of another." Restatement (Second) Conflict of Laws § 174 cmt. a (1971). The district court mistakenly focused solely on the factors generally relevant to tort cases without following the directive of §§ 145 and 174 to apply the conflicts analysis with respect to the individual issues that may arise in a given tort case. Here, the specific issue is whether Florida or Texas law should apply to the question of Hertz's vicarious liability for Creamer's negligence.

Our finding that the district court erred in its analysis by not focusing on § 174, however, does not determine the

---

6. *See Burton v. Gardner Motors, Inc.*, 117 Cal. App. 3d 426, 172 Cal. Rptr. 647, 649 (1981); Conn. Gen. Stat. § 14-154a (2003); *Enter. Leasing Co. S. Cent., Inc. v. Hughes*, 833 So.2d 832, 837-38 (Fla. Dist. Ct. App. 2002); Me. Rev. Stat. Ann. 29-A § 1652; RI Stat. § 31-34-4; *Curtis v. Cuff*, 537 A.2d 1072, 1074 (D.C. 1987); Iowa Code § 321.493; Mich. Comp. Laws § 257.401.

ultimate question in this case: whether the court erroneously held that Texas, not Florida, law should apply on the question of vicarious liability. We must now conduct an analysis of that ultimate question.

(3)

(a)

As we have already noted, Texas has adopted the Restatement (Second) on Conflict of Laws and the "most significant relationship" test outlined in §§ 6 and 145 of the Restatement. *See Duncan*, 665 S.W.2d at 420-21. Section 145 directs that the law of the state with the most significant relationship to the particular issue in tort should govern that issue. Restatement (Second) Conflict of Laws § 145(1) (1971). Section 6 requires us to consider the relative interests of the respective states in having their laws applied to this case.

Comment a of § 145 states that §§ 156-174 "deal[ ] with particular issues in tort" with greater precision as compared to § 145, which is "cast in terms of great generality." This comment concludes that "the best way to bring precision into the field is by attempting to state special rules for particular torts and for particular issues in tort." *Id.*[7]

---

7. The Restatement's framework does not provide a precise method for analyzing its provisions. *See Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1325 (5th Cir. 1995) (noting that the factors and principles in the Second Restatement "defy mechanical application" and are not to be "precisely followed in every instance[ ]").

We therefore turn once again to § 174, which directs us to consider

> (1) whether the relationship between the defendant and the other person makes the imposition of vicarious liability reasonable and (2) whether there is a reasonable relationship between the defendant and the state whose local law is to be applied.

§ 174 cmt. a. As to the first inquiry, the rental agreement created a bailment relationship between Creamer and Hertz in Florida. Comment b of § 174 states that a bailment relationship establishes "an adequate relationship" for the imposition of vicarious liability. As to the second inquiry, there is clearly a reasonable relationship between Hertz and Florida law: Hertz does business in Florida, and the rental contract that provides the potential basis for the imposition of vicarious liability refers to Florida law. Furthermore, the rental agreement required the Creamers to return the car to Hertz in Florida. On this basis, we are persuaded that the bailor-bailee relationship between Hertz and Creamer establishes an adequate basis for the imposition of vicarious liability against Hertz and that Hertz had a reasonable relationship with the state of Florida. We thus find that § 174 weighs in favor of applying Florida law to the vicarious liability issue.

(b)

Continuing our analysis of the relevant Restatement provisions, § 174 next requires us to apply "the rule of § 145." We thus turn to § 145, which provides a list of

contacts that should be considered in determining what state law applies to a specific issue in a tort case. These contacts include:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Hertz emphasizes that both the injury and the conduct causing the injury in this case occurred in Texas. These factors, however, are meant to be "evaluated according to their relative importance with respect to the particular issue." § 145. We also evaluate these contacts qualitatively instead of quantitatively. *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312 (5th Cir. 2000).

That both the injury and the conduct causing the injury occurred in Texas would weigh heavily in favor of applying Texas law to the issue of Creamer's negligence that caused an injury to a Texas citizen on a Texas road. But those contacts are less important in determining which state's law should apply to the issue of Hertz's vicarious liability for those injuries caused by its lessee. More relevant to Hertz's vicarious liability is the place where the relationship of the

parties is centered. *See* § 145(2)(d). The most relevant relationship is that which arises from the lease of the automobile. Although Cates may have a real interest in the lease, Cates, a Texas resident, essentially has no relationship with the lease. Texas has no relationship with the lease, and Hertz has no relationship with Texas concerning this lease. Creamer has no relationship with the state of Texas arising from the lease. Creamer, however, is a Florida resident and is a party to the lease. Hertz is the other party to the lease and does its relevant business in Florida. Florida is the situs where the lease was executed. In short, Florida, not Texas, has the most significant relationship to the issue of Hertz's vicarious liability.

(c)

Now that we have identified the most significant contacts, § 145 directs that these contacts are to be considered under the principles provided in § 6. Section 6 requires us to engage in an analysis of the relative interests of the respective states. Specifically, we should assess:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability, and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

We note that the interests we consider are those that are specifically relevant to the issue of vicarious liability. Our analysis of these factors leads us to conclude that Texas has only a minimal interest in having its law apply to the vicarious liability issue. Texas's interest in avoiding judgments against defendant bailors is not implicated here because Hertz is not a Texas corporation and did not conduct the business relating to this rental agreement in Texas. Furthermore, although Texas has the greater interest in seeing Cates compensated for her husband's injuries and in avoiding the burden of providing medical care for Mr. Cates, it is Florida law, not Texas law, which offers greater protection of those interests.

Florida's interests in having its law applied to the vicarious liability issue in this case, however, are also minimal. Florida's dangerous instrumentality doctrine protects plaintiffs from impecunious drivers by imposing liability on the owners of the vehicles, but here, the plaintiff is not a Florida resident. Further, although Florida may have an interest in regulating the conduct of vehicle bailors to reduce the incidence of accidents, we are not persuaded that that interest extends beyond Florida's borders.

Thus, because the interests of neither state clearly predominate over those of the other, the interest analysis of § 6 provides little impact on our decision. We are, however, persuaded by our reading of the most significant relationship test of §§ 145 and 174 that Florida clearly has the greater connection to the facts and circumstances as they relate to the vicarious liability issue.[8] We therefore conclude that the district court erred in applying Texas law to the issue of Hertz's vicarious liability. Because the district court did not conduct a vicarious liability inquiry under Florida law, we remand this case to it for determination, under Florida law, of Hertz's vicarious liability for Cates's judgment a gainst Creamer. On remand, the district court should focus particularly on whether the Florida law of vicarious liability may be applied to benefit non-Florida residents in a situation such as the case at hand. It seems that the district court will have to make an *Erie* guess to resolve this question, as no Florida precedent exists to resolve the question.

V

In sum, we conclude that the district court did not abuse its discretion in granting Cates's motion for new trial because Creamer did not present evidence rebutting the inference of negligence that arose from his falling asleep at the wheel.

---

8. The dissent criticizes our failure to cite *Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747 (Tex.App.1996), for its reasoning. As previously noted, Texas has adopted the Restatement (Second) of Conflicts of Laws, and § 174 is the section that directly addresses vicarious liability. We find *Bartley*, because it fails to address § 174, unhelpful to our analysis.

The first jury's verdict denying relief to Cates was, therefore, against the great weight of the evidence. We further hold that the district court erred in failing to analyze the conflict of laws question in the specific context of the vicarious liability issue and in failing to apply § 174 of the Restatement. Our own analysis of that section leads us to conclude that Florida, not Texas, law should apply to the vicarious liability issue because the bailment relationship, which is the basis for vicarious liability here, is centered in Florida and because § 174 specifically states that a bailment relationship is an adequate basis for the imposition of vicarious liability. Accordingly, we AFFIRM Cates's judgment against Creamer, VACATE the judgment for Hertz, and REMAND to the district court for determination of Hertz's vicarious liability under Florida law for the judgment entered against Creamer.

AFFIRMED in part; VACATED in part and REMANDED.

Appendix A

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

Insofar as the majority opinion upholds the district court's grant of a new trial to Cates and, consequently, the verdict of the second trial, I concur. However, I respectfully dissent from the portion of the majority's opinion that holds that Florida law applies to the issue of vicarious liability.

This case is undisputedly based on diversity jurisdiction, and our responsibility in diversity cases is to determine what the substantive law of the forum state is, not what we think it should be. *See Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 328 (5th Cir. 2001); *Boardman v. United Servs. Auto. Ass'n*, 742 F.2d 847, 851 (5th Cir. 1984). Moreover, once we have determined what the law is, our duty is to apply it, not to define its contours. *Boardman*, 742 F.2d at 851. I dissent from the majority's opinion because the majority uses the wrong approach in determining what Texas's conflicts law is and in doing so, reaches the wrong result.

The majority cites a Texas Supreme Court case, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.1984), for the proposition that Texas follows the *Restatement (Second) of Conflict of Laws* to determine choice of law in tort cases and appears to conclude that Texas would adopt section 174 of the Restatement in the vicarious liability context. The majority then provides a quite voluminous analysis of how section 174 applies to the facts of this case. But the Texas Supreme Court has never applied the most-significant-relationship test in a vicarious liability case. Consequently,

it is unclear (1) whether Texas's highest court would adopt section 174 as controlling law in the vicarious liability context and (2) how that same court would interpret that section even if it did. Moreover, where a state's highest court has not yet spoken on an issue, we have stated that we will look to the state's appellate courts for guidance unless we are convinced that the highest court of the state would not adopt the appellate courts' reasoning. *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 564-65 (5th Cir. 2004). The best evidence of what the Texas Supreme Court would do in this case can be found in *Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747 (Tex.App.— Amarillo 1996), which I describe below in my discussion of how this case should have been decided.[9] Remarkably, the majority makes no mention at all of *Bartley* and fails to indicate why it believes the supreme court of Texas would not follow the reasoning set out there. And even if the majority has good reason not to follow *Bartley*, it fails to consider the next best solution in a choice of law case in which guidance from the state's supreme court is lacking: certification.

I have spoken out on the importance of certification several times in the past, *see, e.g.*, *Tanks v. Lockheed Martin Corp.*, 417 F.3d 456, 468 (5th Cir. 2005) (DeMoss, J.,

9. There is another Texas appeals court case that not only agrees with *Bartley* but also agrees with the district court below that Texas law should apply in a case like this. *Perkins v. Dynasty Group Auto*, No. 08-01-00493-CV, 2003 WL 22810452, at *3-*4 (Tex.App.— El Paso Nov. 25, 2003) (unpublished). However, because that case is not published, I only cite it here to bolster my contention that *Bartley* is the best evidence of what the Texas Supreme Court would do.

specially concurring); *Compass Bank v. King, Griffin & Adamson P.C.*, 388 F.3d 504, 506-07 (5th Cir. 2004) (DeMoss, J., dissenting), and one reason I dissent here is to emphasize my position regarding that important judicial tool. As I have said before, certifying an unanswered question to a state's supreme court is a preferable course of action to our trying to make an *Erie* guess as to the question of state law involved. Granted, we have refused to certify when the state's law is clear, but the law is anything but clear here—section 174 is ambiguous, and it has never been adopted or interpreted by a Texas court. This Circuit used to subscribe to a federalist policy of seeking guidance in diversity cases from "the one court constitutionally entitled to supply it," the supreme court of the forum state. *Boardman*, 742 F.2d at 851; *see also Puckett v. Rufenacht, Bromagen, & Hertz, Inc.*, 903 F.2d 1014, 1021 n. 13 (5th Cir. 1990) ("This course [of certifying questions directly to the supreme court of the forum state] has been pursued often by the Fifth Circuit and has been enthusiastically endorsed by the Supreme Court."). However, the majority's refusal to even consider certification indicates this Circuit's increasing animosity towards the use of certification in diversity cases. I urge the Court to return to these principles of federalism. As former Chief Judge Brown aptly stated in *Boardman*, quoting his own law review article, "Federal courts should hesitate to 'trade judicial robes for the garb of prophet' . . . when an available certification procedure renders the crystal ball or divining rod unnecessary." *Boardman*, 742 F.2d at 851 (quoting John R. Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 455 (1977)). We should heed Judge Brown's advice and use the great tool of certification more freely.

Another reason I dissent is that even if the majority uses the right approach, I believe it reaches the wrong result. First, Bartley is a good indicator of how the Texas Supreme Court would decide this case. Not only are *Bartley's* facts substantially similar (a Texas plaintiff suing a Michigan car rental agency for the negligence of a driver), but also the underlying policy reason for selecting Texas substantive law is the same. In *Bartley*, the Seventh Court of Appeals of Texas declined to apply the law of Michigan, the state where the car rental agency was located, because it found that layering Michigan's "no fault" liability scheme on top of Texas's system of "proportional responsibility and recovery" would have an unjust result, especially when the limited damages aspect of Michigan law was not also imported. *Bartley*, 919 S.W.2d at 755-56. The Bartley court found it determinative that the plaintiff sought a recovery unlimited by law through application of part of a Michigan law that, if applied in its entirety, would have limited recovery. *Id.* at 755. In this case, the plaintiff attempts to recover $2,156,000.00 from the defendant car rental agency under Florida's dangerous instrumentality doctrine. Yet the plaintiff does not seek application of the rest of Florida's laws, which limit the liability of lessors who rent or lease a motor vehicle for less than one year. *See* Fla. Stat. Ann. § 324.021(9)(b)(2) (generally limiting a lessor's liability to $100,000 per individual and $300,000 per incident (unless the lessor does not carry adequate insurance)); *see also Fischer v. Alessandrini*, 907 So.2d 569, 570- 71 (Fla.Dist.Ct.App.2005) (discussing the policy for limiting recovery under the dangerous instrumentality doctrine). I do not see how the majority can ignore *Bartley* on these facts, especially where

"applying the law of the forum, Texas, will further its own policy of serving the interest of certainty, predictability and uniformity of result, thereby providing ease in the determination and application of the law." *Bartley*, 919 S.W.2d at 756.

The second reason I believe the majority reaches the wrong result is that it misinterprets sections 174 and 145 of the Restatement. First, the comments to section 174 do not cover the situation where party A, a domiciliary of state X, rents a car from B rental agency in state X and, with permission, drives to state Y and negligently injures party C there. Furthermore, comment c states,

> Vicarious liability may also be imposed by application of the local law of some state other than that of conduct and injury. So, for example, vicarious liability may be imposed under the local law of the state where the relationship between the one sought to be held liable and the tortfeasor is centered. *Application of the local law of this state to impose vicarious liability is particularly likely if this state has some relationship to the injured plaintiff.*

Restatement (Second) of Conflict of Laws § 174 cmt. c (1971) (emphasis added). Here, Florida has no relationship to the injured plaintiff. Therefore, section 174 does not provide a concrete answer as to whether vicarious liability should be imposed on the car rental agency in our case, contrary to the majority's assertion.

Turning to section 145, the majority incorrectly interprets the fourth contact to be considered under that section in determining what state law applies to a specific issue in a tort case—" the place where the relationship, if any, between the parties is centered." *See id.* § 145(2)(d). The majority states that the relevant relationship is "that which arises from the lease of the automobile." But there was no relationship between the parties prior to the accident in this case, and at least one Texas court has held that section 145's fourth contact is irrelevant in that situation. *Bartley*, 919 S.W.2d at 755. Because the majority finds this contact to be determinative in Part B.3.b of its opinion, I believe its result is flawed.

Because I have not been able to convince the majority to certify the conflicts question presented in this case to the Texas Supreme Court, I suggest what I believe is the next best option for the district court on remand: Now that we have affirmed the $2,156,000.00 judgment in favor of Cates against Creamer, the district court should dismiss without prejudice Cates's claim against Hertz, and thereby permit Cates to sue Hertz in Florida on the theory that Florida's vicarious liability law makes Hertz liable to pay the judgment against Creamer. *See Manshack v. Southwestern Elec. Power Co.*, 915 F.2d 172, 174 (5th Cir. 1990) ("[T]he courts have generally followed the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit."). Although some courts have held that dismissal is not appropriate when the plaintiff will reinstate the action in a forum that will apply a different body of substantive law,

see, e.g., Rodriguez v. Marks Bros. Pickle Co., 102 F.R.D. 104 (E.D.Wis. 1984), that is not the case here. The majority opinion requires the district court in Texas to apply Florida state law, and that is the same body of substantive law that a Florida court would apply if the claim against Hertz were brought there. No prejudice to the defendant would result. *Manshack*, 915 F.2d at 174 (finding no prejudice where the same choice of law principles would apply in state court).

For the above reasons, I respectfully dissent from the portion of the majority's opinion that holds that Florida law applies to the issue of vicarious liability, and I recommend that the district court below dismiss the claim against Hertz without prejudice so that the plaintiff can bring her claim against Hertz in Florida state court.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, WICHITA FALLS DIVISION, SIGNED AUGUST 6, 2001 AND FILED AUGUST 7, 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

Civil Action No.: 7:00-CV-121-R

PRISCILLA S. CATES, INDIVIDUALLY AND AS GUARDIAN OF THE PERSON OF AND ESTATE OF BOBBY RAY CATES, AN INCAPACITATED PERSON,

Plaintiffs,

vs.

MATTHEW SCOTT CREAMER, LAMAE CREAMER, AND THE HERTZ CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs Priscilla and Bobby Ray Cates (collectively the "Cates") have asserted claims against Matthew and Lamae Creamer (collectively the "Creamers") for negligence and against the Hertz Corporation ("Hertz") under Florida's dangerous instrumentality doctrine or, alternatively, under Texas's negligent entrustment laws. Now before this Court

is Hertz's Motion for Summary Judgment, filed July 3, 2001.[1] For the reasons stated below, Hertz's Motion is **GRANTED.**

I. BACKGROUND FACTS

On June 29, 1998 the Creamers rented a 1998 Ford Windstar from a Hertz agency in Panama City, Florida. This vehicle was registered and licensed in Florida. The Creamers told Philip Long ("Long"), the Hertz agent, that they were traveling from Panama City to Spearman, Texas and that they planned to make the twenty-four hour drive by alternating drivers through the night. Long checked Mrs. Creamer's driver's licence and credit card, but failed to check Mr. Creamer's driver's license. Moreover, he did not add Mr. Creamer as an authorized driver to the vehicle.

Long then spoke with Mr. Creamer about insurance coverage. The Creamers had an automobile liability policy with Allstate Insurance Company with coverage limits of $20,000 per person and $40,000 per accident. Long indicated that the Creamers may not be covered under their own policy and suggested Hertz's insurance coverage. The Creamers purchased loss damage waiver coverage, which protected the vehicle but did not offer liability coverage. Mrs. Creamer then initialed a provision waiving Hertz's primary liability protection and personal injury protection under Florida law.

---

1. Hertz was seven days late in filing its Motion for Summary Judgment and the Cates have objected. Although June 26, 2001 was the deadline for joint submission of dispositive motions, the Cates have failed to establish that they have been prejudiced by Hertz's minimal tardiness. Therefore, the Cates' objection is overruled.

The Creamers then loaded the van and began driving around noon. Mr. Creamer drove approximately eight hours from Panama City to the outskirts of New Orleans, Louisiana. Mrs. Creamer then drove through the night while Mr. Creamer slept in the front passenger seat. Mr. Creamer awoke near daybreak and realized the car was stopped on the side of the road and Mrs. Creamer was sleeping. He moved to the driver seat and resumed driving. At some point he fell asleep while driving and awoke as he hit the Cates' 1977 Chevrolet on U.S. Highway 81, about three miles south of Bowie, Texas. Mr. Cates was standing in front of the open front passenger door when the accident occurred and the impact projected him several feet into the roadway.

As a result of the accident, Mr. Cates sustained severe head injuries and is now unable to care for himself. He resides at a long-term care facility and Mrs. Cates has been appointed his guardian. Mr. Cates' medical expenses exceed $200,000 and he can no longer engage in employment as a result of his condition. The Cates have initiated the present lawsuit to recover for Mr. Cates' personal injuries. The Cates argue that Florida law should control this case. Hertz disagrees.

II. LEGAL ANALYSIS

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Melton v.*

Teachers Ins. & Annuity Ass'n. of Am., 114 F.3d 557, 559 (5th Cir. 1997). An issue is "material" if it involves a fact that might affect the outcome of the suit under governing law. *See Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994). The court must decide all reasonable doubts and inferences in the light most favorable to the party opposing the motion. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). In addition, when both parties have submitted contradictory evidence, factual controversies are resolved in favor of the nonmovant. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion must be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. Where the nonmoving party bears the burden of proof on a claim upon which summary judgment is sought, the moving party may discharge its summary judgment burden by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. Once the moving party has satisfied this burden, the nonmoving party must go beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories, and admissions on file set forth specific facts

showing a genuine issue for trial. *See id.* at 324; *Anderson*, 477 U.S. at 256-57. Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ." *Celotex*, 477 U.S. at 322.

B. Choice of Law

In diversity cases, such as the matter presently before this Court, federal courts must apply the choice of law rules for the forum state. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Texas courts use the "most significant relationship test" as set out in the Restatement (Second) of Conflict of Laws (the "Restatement") to evaluate choice of law in a tort case. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Section 6 of the Restatement outlines the general principles that inform a choice of law determination. Restatement (Second) of Conflict of Laws at § 6. Without a statutory directive, the factors relevant to the choice of applicable rule of law include:

> (a) the needs of the interstate and international systems, (b) the relevant polices of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *Id.*

More specifically, section 145 addresses choice of law analysis in *tort* cases. *Id.* at § 145. In applying the principles of section 6 to a tort case, the Court should consider (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *Id.* Courts should evaluate these contacts for their quality, addressing their relative importance with respect to each particular case, rather than for quantity. *Gutierrez*, 583 S.W.2d at 319.

Mr. Cates sustained personal injuries from a collision that occurred in Texas. Without legal authority, Cates urges this court to classify the place of injury as fortuitous, thereby minimizing the role this factor plays in the determination of choice of law. The argument, however, overlooks the fact that the Cates lived in Texas during the time period leading up to the accident. It is not fortuitous that Cates was injured in Texas because he lived in Texas and was very unlikely to have been injured in any other place. *See Crisman v. Cooper Indus.*, 748 S.W.2d 273, 278-79 (Tex.App.—Dallas 1988) (holding that Texas law cannot apply when a defective trailer was operated solely in Florida thereby allowing injuries to occur only in Florida).

Furthermore, the doctrine of fortuity generally applies only to aircraft injuries where the plaintiffs were on board the plane during the crash. *In re*: *Air Crash Disaster near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 615 (7th Cir. 1981). These plaintiffs do not include bystanders on the ground. *Id.* Even applying the airplane rationale to this case,

Cates' argument fails because at the time of the crash he was effectively a bystander who became involved in the accident when the crash vehicle driven by Mr. Creamer collided with his car. Thus, in the absence of appropriate facts, the doctrine of fortuity will not be applied in this case. As a result, this first factor indicates that Texas law should govern this matter because the injury occurred in Texas.

The second factor to evaluate is where the conduct causing the injury occurred. The Cates argue that their injuries are not their actual personal injuries, but rather their *inability to adequately recover damages* from the Creamers their for personal injuries. Then, without discussion, the Cates conclude that this injury occurred in Florida where the car was rented. This reliance is misplaced. The Cates have not sustained financial injuries but rather personal injuries for which they seek compensatory damages.[2] The conduct leading to the personal injuries was Mr. Creamer falling asleep at the wheel and subsequently striking the Cates' car. This conduct occurred in Texas, not Florida, and therefore this second factor supports the application of Texas law.

The third factor for the Court to consider is the domicile, residence, nationality, place of incorporation, and place of business of the parties. The Cates are Texas residents. Hertz is a Delaware corporation with its principal place of business in New Jersey. The Cates assert that Hertz has subjected itself to Florida law by conducting business within the state. This argument neglects to consider that Hertz operates in many

2. However, even if the Court were to deem the injury to be financial in nature, the conduct causing it results from Texas law which precludes recovery under dangerous instrumentality laws.

states, including Texas, and can therefore be subjected to the laws of a multitude of states. Furthermore, compensation of an injured plaintiff is primarily a concern of the state in which the plaintiff is domiciled. *Torrington Co. v. Stutzman*, 2000 WL 1862923,*16 (Tex.2000). Texas has the most direct interest in the Cates' recovery, and therefore, Texas law should govern such recovery. *Id.*

The final factor concerns the place where the relationship between the parties, if any, is centered. Section 145 indicates that this relationship is one between plaintiff and defendant. *See* Restatement at § 145. The Cates concede that they had no relationship with Hertz and therefore this factor should be moot. Nevertheless, without authority, the Cates argue that the relationship the Court should consider is that between the co-defendants. This relationship was indeed formed in Florida, but because this is not the type of relationship envisioned by the Restatement, this Court will not consider it further.

The three relevant factors of the significant relationship test uniformly suggest that Texas law be applied in this case. Texas has the most significant relationship to the case, and therefore, section 145 mandates application of Texas law. *Accord Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747, 755- 56 (Tex.1996).

In determining under section 6 the law of the state controlling the rights and liabilities of the parties with respect to the issue in tort, the only contact of importance is the Cates' residence in Texas and Hertz's incorporation in Delaware, its principal place of business in New Jersey, and its residence in a variety of states including Florida. *See id.* at 755. The

Cates seek application of the dangerous instrumentality doctrine of Florida tort law to replace Texas' doctrine of negligent entrustment.

Texas implemented a system of proportional responsibility and recovery in causes of action based upon torts. *Id.* The purpose of this legislation was to make the Texas civil justice system fairer and more predictable by favorably affecting the affordability and availability of liability insurance, thereby promoting economic development in the state. *See id.* These policies would be frustrated if Florida's dangerous instrumentality law were imposed on the Texas system. The Cates have not suggested a Florida policy that would be advanced by the export of Florida's state tort laws.

Moreover, a decision to use Texas law allows the state to protect the litigation interests of its own residents. *See Stutzman*, 2000 WL 1862923 at *16. Accordingly, under the guidance of sections 6 and 145, this Court will apply Texas law in this matter because Texas has the most significant relationship to the case.

C. Negligent Entrustment

Under Texas tort law, the Cates concede that their only cause of action against Hertz is for negligent entrustment. The elements of negligent entrustment are (1) entrustment of a vehicle by the owner, (2) to an unlicensed, incompetent, or reckless driver, (3) that the owner knew or should have known to be unlicensed, (4) the driver was negligent on the occasion in question, and (5) the driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex.1988); *Williams*

v. Steves Indus., Inc., 699 S.W.2d 570, 571 (Tex.1985) (overruled on other grounds). Knowledge of the driver's incompetency at the time of the entrustment is an essential element to establish negligence. *Monreo v. Grider*, 884 S.W.2d 811, 815 (Tex.App.—Dallas 1994). Hertz disputes that the Windstar was entrusted to an unlicensed, incompetent, or reckless driver.

The Florida Department of Highway Safety and Motor Vehicles report reveals that Mr. Creamer had a valid Florida driver's license at the time he rented the vehicle. Even if, as the Cates allege, Hertz failed to properly check the driver's license of Mr. Creamer, the license existed in good standing at the time of rental. Therefore, Hertz did not entrust the vehicle to an unlicensed driver. Thus, the Cates must proceed on the argument that Mr. Creamer was either an incompetent or reckless driver.

A prior accident or traffic violation does not create an inference or conclusion that a driver is incompetent or reckless. *Id.* In a scenario such as this where a party rents a vehicle from a clerk with whom he is not acquainted, a driver's license generally serves as the only possible test of competency. Since Mr. Creamer did not know the Hertz representative and he maintained a valid driver's license at the time of rental, the facts indicate that Mr. Creamer was competent at the time of rental.

The Cates argue that Mr. Creamer's admission of his intent to drive non-stop alternating with his wife between shifts of driving and sleeping indicated that they would be driving in a reckless manner. Texas courts have held that negligent entrustment does not exist when drivers rotate

throughout a long distance trip, even when the party entrusting the vehicle saw the driver consuming alcohol soon before the trip. *Rodriguez v. Sciano*, 18 S.W.3d 725, 728 (Tex.App.—San Antonio 2000) (upholding summary judgment against the plaintiffs where the only facts supporting negligent entrustment were that the drivers drove in shifts). Under the circumstances of this case, where the Creamers, like the drivers in *Rodriguez*, simply planned to drive in shifts, there is no evidence that at the time of rental Mr. Creamer was a reckless driver. Because the Cates have presented insufficient evidence to show that Mr. Creamer was either unlicensed, incompetent, or reckless when he and Mrs. Creamer rented the Windstar, the Cates cannot establish this element of their negligent entrustment claim against Hertz. Therefore, the Cates are not able to establish a *prima facie* case of negligent entrustment and Hertz is entitled to summary judgment on the claim.

III. CONCLUSION

For the aforementioned reasons, Hertz's Motion for Summary Judgment is **GRANTED.** The Cates' claims against Hertz are **DISMISSED.**

IT IS SO ORDERED.

Signed this 6 day of August, 2001.

s/ Jerry Buchmeyer
CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, WICHITA FALLS DIVISION, DATED AND FILED OCTOBER 17, 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

7:00-CV-121-R

PRISCILLA S. CATES, INDIVIDUALLY AND AS GUARDIAN OF THE PERSON OF AND ESTATE OF BOBBY RAY CATES, AN INCAPACITATED PERSON,

Plaintiffs,

vs.

MATTHEW SCOTT CREAMER, LAMAE CREAMER, AND THE HERTZ CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER

On August 7, 2001, this Court's Memorandum Opinion and Order granted Defendant Hertz's Motion for Summary Judgment (filed July 3, 2001). Now before this Court is Plaintiffs' Motion for Reconsideration of Summary Judgment. Plaintiffs Motion is **DENIED** for the reasons stated herein.

Appendix C

Motions for reconsideration are permitted only in limited situations, primarily " 'to correct manifest errors of law or fact or to present newly discovered evidence.' " *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5 th Cir. 1989) (*quoting Keene Corp. v. Int'l Fidelity Ins. Co.*, F.Supp. 656, 665 (N.D.Ill.1982), *aff'd* 735 F.2d 1367; *aff'd* 736 F.2d (7th Cir. 1984)). In their Motion for Reconsideration of Summary Judgment, Plaintiffs contend that this Court erred in its choice of Texas law and argue that Florida law applies. Having taken all of Plaintiffs' choice of law arguments into consideration once again, this Court finds that Plaintiffs fail to elucidate any manifest errors of fact or law, or to present any newly discovered evidence.

The central issue of this case, the Cates' and Creamers' car accident, occurred in Texas. The relationship between the Cates and the Creamers was thus created in Texas. Plaintiffs Priscilla and Bobby Cates lived in Texas. The Court notes that Florida's law could be more generous to Plaintiffs' recovery; however, the most significant state contact in terms of quality and quantity is Texas. Therefore, the Court is satisfied with its application of Texas' Most Significant Relationship Test in holding that Texas law applies in this tort case. The claims against Hertz remain dismissed. Plaintiffs' Motion for Reconsideration of Summary Judgment is **DENIED.**

Appendix C

It is so **ORDERED.**

SIGNED THIS 17 DAY OF OCTOBER, 2001.

s/ Jerry Buchmeyer
CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING THE PETITION FOR REHEARING AND THE PETITION FOR REHEARING *EN BANC* DATED AND FILED APRIL 11, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-10404

PRISCILLA S. CATES, Individually and as Guardian of the Person and Estate of Bobby Ray Cates, an Incapacitated Person

Plaintiff-Appellant-Cross-Appellee

v.

MATTHEW SCOTT CREAMER;

Defendant-Appellee-Cross-Appellant

LAMAE CREAMER; HERTZ CORPORATION

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

ON PETITION FOR REHEARING AND REHEARING *EN BANC*

(Opinion 11/28/05, 5 Cir., __, __ F.3d __)

Appendix D

Before JONES, Chief Judge, JOLLY and DEMOSS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having reqested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ [illegible] Jolly
United States Circuit Judge

DeMOSS, Circuit Judge, concurring in part and dissenting in part.

APPENDIX E — STATUTORY PROVISION INVOLVED

Restatement (Second) of Conflict of Laws § 174 (1971)

Topic 1. Torts
Title C. Important Issues

§ 174. Vicarious Liability

The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person.

Comment:

a. Rationale. The local law of the state which has the most significant relationship to the occurrence and the parties with respect to the issue of vicarious liability should be applied in determining whether one person is liable for the tort of another person. This state should be selected in accordance with the choice-of-law principles stated in § 6. These principles require that the forum consider (1) whether the relationship between the defendant and the other person makes the imposition of vicarious liability reasonable and (2) whether there is a reasonable relationship between the defendant and the state whose local law is to be applied.

b. Relationship to tortfeasor. One person should not be held liable for the tort of another person unless his relationship to the other person makes the imposition of such liability appropriate. In making this determination, the forum will not be guided exclusively by its own local rules of vicarious liability. The fact that vicarious liability would not be imposed by the local law of the forum will not of itself be

decisive. It is enough that the forum believes that the relationship between the defendant and the other person affords a fair and reasonable basis for the imposition of such liability. In reaching its decision as to what is fair and reasonable, the forum will be influenced by rules of vicarious liability prevailing in other states. It is unlikely that a relationship which forms the basis for the imposition of vicarious liability in a substantial number of states will be held inadequate by the forum even if it would not result in such liability under the forum's local law. Generally speaking, any arrangement whereby one person has been authorized to assist in carrying out the business affairs of another person will provide an adequate relationship for this purpose. And the same is true of the relationship between bailor and bailee and of the relationships involved in the family purpose doctrine which concerns automobiles (see Comment e).

Illustrations:

1. In state X, A enters into an agreement with B whereby B is to transport A's goods from X to state Y in B's truck. In Y, B negligently runs his truck over C and injures him. C brings suit in X against A to recover for his injuries. Under X local law, the relationship between A and B would be that of employer and independent contractor and A would not be vicariously liable for B's torts. Under Y local law, however, the relationship between A and B would be that of master and servant and A would be liable. The X court will hold that A's relationship to B provides a reasonable basis for the imposition upon A of vicarious liability.

2. In state X, A gives B the use of his automobile and authorizes him to drive it into state Y. In Y, B negligently runs the car over C and injures him. C brings suit in X against A to recover for his injuries. Under X local law, A would not be liable for B's torts. Y, however, has a statute which makes the owner of an automobile liable for injuries resulting from the negligent operation of the automobile by one who is using it with the owner's permission, express or implied. The X court will hold that A's relationship to B provides a reasonable basis for the imposition upon A of vicarious liability.

3. A and B, husband and wife, are domiciled in state X. With A's knowledge, B goes to state Y on a vacation and there she assaults C. C brings suit in X against A to recover for his injuries. Under X local law, a husband is not liable as such for his wife's torts. The contrary is true, however, under the local law of Y which still retains the almost universally discarded common law rule. The X court will find that the relationship between A and B is not such as to make the imposition of vicarious liability reasonable.

Comment:

c. Relationship to state. One person should not be held liable for the tort of another person by application of the local law of a state to which he has no reasonable relationship. The forum will use its own judgment and will apply its own rules in determining whether such a reasonable relationship exists (See § 7).

To date, the majority of the decisions have been concerned with the question whether vicarious liability should be

imposed under the local law of the state where the complained-of conduct and the resulting injury occurred. These decisions indicate that vicarious liability will be imposed under the local law of the state of conduct and injury if the tortfeasor entered the state on the instructions of the one sought to-be held vicariously liable. The same will be true if the one sought to be held liable authorized, but did not direct, the tortfeasor to enter the state (see Illustration 4), or simply if he had reason to foresee that the tortfeasor might enter the state (see Illustration 5) or might take action elsewhere that would have tortious consequences in the state.

Illustrations:

4. In state X, A lends his automobile to B without placing any restriction upon its use. B takes the automobile to Y, a neighboring state, and there negligently injures C. C brings suit in X against A to recover for his injuries. Under X local law, A would not be liable for B's torts. Y, however, has a statute which makes the owner of an automobile liable for injuries resulting from the negligent operation of the automobile by one who is using it with the owner's permission, express or implied. The X court will hold that A's relationship to Y provides a reasonable basis for the application of the Y statute to hold A vicariously liable.

5. Same facts as in Illustration 4 except that A forbids B to take the automobile to Y. A knows, however, that B has a pressing reason to go to Y and that he sought the loan of the automobile for this purpose. The X court will hold that A's relationship to Y provides reasonable basis for the application of the Y statute to hold A vicariously liable.

Appendix E

Comment c (cont.):

Vicarious liability may also be imposed by application of the local law of some state other than that of conduct and injury. So, for example, vicarious liability may be imposed under the local law of the state where the relationship between the one sought to be held liable and the tortfeasor is centered. Application of the local law of this state to impose vicarious liability is particularly likely if this state has some relationship to the injured plaintiff (see Illustration 6). There are undoubtedly still other situations where vicarious liability may be imposed.

Illustration:

6. In state X, A, who is domiciled in X, rents a car from the B rental agency. With C, who is also domiciled in X, as a guest passenger, A drives into Y, an adjoining state, and there negligently injures C. Under an X statute, the bailor of an automobile is liable for injuries caused by the negligence of the bailee. No such liability is imposed upon the bailor by Y local law. B will be held liable to C.

Comment:

d. Independent contractor. An employer will be held liable for the torts of an independent contractor if he would be so liabll under the law selected by application of the rule of this Section.

e. Family purpose doctrine. A person will be held liable for the torts of a member of his family who is driving the person's

automobile with his permission if he would be so liable under the law selected by application of the rule of this Section.

f. Principal-agent. A principal will be held liable for the tort of an agent if he would be so liable under the law selected by application of the rule of this Section.